

NOV 07 2007

Giovannoni v. Bidna & Keys, No. 06-15640

THOMAS, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I join the majority's decision to remand on the issue of non-taxable costs and to deny Bidna & Keys' motion for fees and costs. However, I respectfully dissent from the affirmation of the district court's across-the-board reduction in attorney's fees. Although the district court appropriately justified some reduction in the fee award, it failed to explain adequately why it chose to make an across-the-board percentage cut rather than set forth an hour-by-hour analysis. Moreover, the district court failed to offer any explanation as to why a reduction rate of 50% was specifically appropriate.

A "district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure 'as a practical means of trimming the fat from a fee application.'" *Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992). However, we have criticized such a "meat-axe approach" and held that "decisions of district courts employing percentages in cases involving large fee requests are subject to heightened scrutiny." *Id.*; see also *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1150 (9th Cir. 2001) ("[i]f the district court nonetheless decides to reduce the lodestar hours on a pure across-the-board basis, then we need an explanation for that choice if we are meaningfully to review the fee award for abuse of discretion"). We have also held that "even

where the district court does explain adequately the decision to cut the lodestar hours compensated by the across-the-board method, there is still the need for the district court to provide, after an independent perusal of the record, some explanation for the precise reduction chosen.” *Ferland*, 244 F.3d at 1151; *see also Gates*, 987 F.2d at 1400 (district court must “set forth a ‘concise but clear’ explanation of its reasons for choosing a given percentage reduction”). The requirement of an explanation guards against arbitrary fee reductions, while permitting the district court the latitude it needs in determining the appropriate amount of fees to award.

In this case, I do not necessarily disagree with the reasonableness of the district court’s ultimate conclusion, nor do I necessarily disagree with the district court’s approach. Indeed, it appears to me that the district court gave this matter a great deal of careful consideration. However, because the district court’s explanation does not conform to the requirements of controlling precedent, I would vacate the fee award and remand the issue to the district court for its reconsideration and for the entry of a new fee order.